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Paper for the House Committee Meeting
on 20 May 2005

Legal Service Division Further Report on
Protection of Endangered Species of Animals and Plants Bill

Members may recall that at the House Committee meeting on 29 April 2005, the Legal Adviser reported that the Legal Service Division was scrutinizing the legal and drafting aspects of the Bill and would provide a further report to the House Committee if necessary.

2. We have written to the Administration to clarify some policy and drafting issues on the Bill and a copy of our letter (Annex B) and its reply (Annex A) are enclosed. We still have some outstanding drafting issues for clarification with the Administration.

3. One of the queries we have requested the Administration to clarify is the policy intent of the selection criteria of "relevant parts of the Convention instrument that have the force of law in Hong Kong" in Schedule 3, which the Secretary for the Environment, Transport and Works ("the Secretary") is to be empowered under section 48 to amend by order published in the Gazette.

4. Extracts of the Administration's reply and our comment are as follows-

(a) "Although not binding in international law, they could be regarded as recommended good practices decided upon by the Conference of Parties… . We therefore propose that the recommendations that are considered to have the effect of enhancing the effectiveness and operation of CITES, and those that would have more general or permanent application for guiding the implementation of CITES in Hong Kong, should be given the force of law in Hong Kong".

The adoption by the Administration of the non-binding recommended practices as binding provisions in Hong Kong is an issue with policy implications.

(b) "We note that these instruments cover mostly guidelines that are more technical in nature... . As the contents of these instruments may need to be updated or modified from time to time by the Conference of Parties, we therefore consider it more appropriate to set out these

elaborate guidelines in Schedule 3 of the Bill and to empower the SETW to amend the Schedule by an Order published in the Gazette so as to ensure the timely incorporation of the relevant changes into our domestic law".

We concur that some of the provisions in Schedule 3 are technical in nature. However, some of the terms are defined under section 2 by drawing references to the meaning assigned to them in Schedule 3 and change of meaning of these terms may have impact on the implementation of the provisions of the Bill. For example, a person who commits an offence under section 5 is liable on conviction to a fine of $100,000 and to imprisonment for 1 year. But under section 10, if the court is satisfied that his act was carried out for commercial purposes, that person, instead of being liable to the penalty prescribed under section 5, is liable to a fine for $5,000,000 and to imprisonment for 2 years. Therefore, a change in the definition of "commercial purposes" in Schedule 3 will affect the operation of the other sections in the Bill. In the light of the consequences of such interpretations, whether they should be removed from Schedule 3 to the main body of the Bill or the Secretary should be empowered to amend them in Schedule 3 by subsidiary legislation would require careful policy considerations.

5. In view of the specific policy issues raised by these important provisions of the Bill, Members may wish to set up a Bills Committee to study the Bill in detail.

Encl

Prepared by

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18 May 2005

EP 55/25/01

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14 May 2005

Legislative Council Secretariat
Legal Service Division
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Miss Monna Lai

Dear Miss Lai,

Protection of Endangered Species of Animals and Plants Bill

Thank you for your letter on 7 May 2005.

Regarding your comments on the Protection of Endangered Species of Animals and Plants Bill (the Bill), our responses are as follows:

(a) Clause 2 – Convention Instrument

While the basic framework laid down by the text proper of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is to be provided in the main body of the Bill, there are also recommendations made by the Conference of the Parties for complementing those broad principles with interpretative guidance, additional rules and standard procedures. Although not binding in international law, they could be regarded as recommended good practices decided upon by the Conference of Parties and are also commonly adopted by the majority of the Parties of CITES. We therefore propose that the recommendations that are considered to have the effect of enhancing the effectiveness and operation of CITES, and those that would have more general or permanent application for guiding the implementation of CITES in Hong Kong, should be given the force of law in Hong Kong.

Recommendations may be recorded in the form of resolutions or decisions, and such resolutions and decisions may be provided with notifications issued by the Secretariat to the Parties. "Convention instrument" is therefore used as the shorthand referring collectively to resolutions, decisions and notifications adopted or made by the Conference of the Parties or issued by the Secretariat in relation to CITES. Although resolutions are generally intended to provide long-standing guidance while decisions are said to be typically containing instructions to be implemented often by a specified time, the distinction may not always be so clear-cut. Since there is no hard and fast rule delineating the contents of these different instruments, the criteria for selecting their relevant parts for inclusion in Schedule 3 to the Bill are based on the substance of the recommendations rather than the title of their source instruments.

For the sake of legal certainty and transparency, we consider that it is in the public interest to make these recommendations (which are currently scattered in different instruments) more accessible by clearly setting them out in legislation. However, we note that these instruments cover mostly guidelines that are more technical in nature and will not affect the basic principles of CITES that are incorporated in the main body of this Bill. As the contents of these instruments may need to be updated or modified from time to time by the Conference of Parties, we therefore consider it more appropriate to set out these elaborate guidelines in Schedule 3 of the Bill and to empower the SETW to amend the Schedule by an Order published in the Gazette so as to ensure the timely incorporation of the relevant changes into our domestic law.

(b) Clause 2 - Re-export Certificate

The meaning of “export” as defined in clause 2 does not apply to and will not affect the interpretation of the expression “Convention export permit” because the latter is a separately defined term on its own under clause 2. It refers to certain permits, certificates or other documents that conform to the applicable provisions in Part 2 of Schedule 3, which cover both export permits and re-export certificates.

(c) Clause 3 – Meaning of "In-transit"

The purpose of Article VII.1 of CITES is to ensure that a regulated specimen will not remain permanently in a place where it is in transit without valid documentation and, at the same time, avoid imposing an unreasonable burden on shipments transiting a place on the way to their final destinations.

The CITES Conference of Parties and the Secretariat have not made any specific decisions and resolutions to interpret the meaning of "remain in customs control". We consider that "remain in customs control" may be interpreted to mean direct control such as taking into possession or custody, or other indirect control such as when the goods or objects are subject to any specific directions by the relevant authority. Goods or objects brought into Hong Kong by a carrier are subject to customs control before clearing customs even if they are not under direct control of a customs officer. It would be unreasonable to expect the AFCD/Customs to take physical custody of the relevant goods if they remain on board the incoming carrier and are meant to be transported on the same carrier to a place outside Hong Kong within a short time.

If the specimen has not been unloaded from the incoming carrier and remains at all times in or on the incoming carrier as provided in clause 3(b)(i) (similar to the existing section 2A(1)(c)(i) of Cap. 187), direct control by the Director or an authorized officer in such circumstances is not necessary or practicable.

Having regard to the already stringent scheme of control imposed by clause 3, we are of the view that it should be sufficiently secure to accomplish the purpose of Article VII.1, which is to provide for exemption for goods in transit.

(d) Clause 22 – Import, Re-export and Possession or Control of Specimens in Transit

The provisions governing specimens in transit in clause 22 constitute an express exception to the provisions in Parts 2 and 3 restricting the import, re-export and possession or control of scheduled species (please refer to clauses 5(1)(a), 8(1)(a), 9(1)(a), 11(1)(a), 14(1)(a) and 15(1)(a)).

As the whole process for dealing with a specimen in transit comprises the acts of importation, re-exportation, possession and control, the exception in clause 22 allows a person to engage in such acts during the transit period upon compliance with the requirements set out in that clause. All the above provisions together form part of the entire scheme of arrangements under our regulatory regime.

(e) Clauses 10 and 16 – Penalties

An offence committed under clause 9 or 15 is the same act as referred to in clause 10 or 16. For the sake of clarity, the bracketed expression "including possession or control of a specimen" is inserted after "the act" in clauses 10 and 16 to avoid any argument that a person having in his possession or under his control a specimen as mentioned in clauses 9 and 15 is not regarded as an "act".

(f) Clauses 18 and 21 – Import, Possession or Control Licence

It is our policy intention to require a person to obtain an import or possession or control licence for import, possession or control of certain types of Appendix II species as specified in Clauses 18(a)(i) and (ii) and 21(a) and (b). This is over and above the CITES requirement where no import, possession or control licence is required for all Appendix II species.

"The specimen is not a live animal or plant of wild origin" means a live animal or plant originated from a captive-bred or artificially propagated source and not of a wild origin.

CITES Article VII.4 specifies that specimens of an Appendix I animal species bred in captivity for commercial purposes, or of an Appendix I plant species artificially propagated for commercial purposes, shall be deemed to be specimens of an Appendix II species. CITES Resolution 12.10 (Rev. CoP13) further states that the exemption of Article VII.4 should be implemented through the registration by the Secretariat of operations that breed specimens of Appendix I species for commercial purposes. Clause 2(2) is to implement these CITES requirements and recommendations. "A live animal or plant that shall be treated as a specimen of an Appendix II species under section 2(2)" refers to such

circumstances.

Some species are listed in both Appendices I and II. Whether such a species is listed in Appendix I or Appendix II depends on the population involved. For example, in the case of *Ursus arctos* (brown bear), populations of Bhutan, China, Mexico and Mongolia are listed in Appendix I while all other populations are included in Appendix II. "The species is not of a population included in Appendix I if the species is specified in both Appendix I and Appendix II" means such situation.

(g) Clauses 23 and 52 – Re-export Licence

A re-export licence is issued under clause 23 for species that are listed under Schedule 1 to the Bill. Schedule 1 reflects the CITES Appendices in force. However, the Appendices are subject to change at each meeting of the CITES Conference of Parties. To give effect to the changes that are adopted, the local legislation has to be amended accordingly. Under clause 23, the re-export licence can only be issued for a specimen of a "scheduled species". There may be cases where newly added CITES species are already subject to control in some importing countries but yet to have been included in our local Ordinance pending legislative amendments. In the circumstances, traders may apply for re-export certificates under clause 52 in respect of specimens of such species to facilitate their re-export to relevant importing countries.

There are also cases where the importing country requires a document issued by the relevant authority of the exporting country confirming that the specimens in the shipment are not CITES-listed species. Such a document will also be issued in the form of a re-export certificate under clause 52. It will not be issued under clause 23 because it does not relate to a specimen of a "scheduled species".

(h) Clause 26 – Licence under Appeal

The Director will include in an export or re-export licence a condition requiring the licensee to obtain an authorized officer's prior endorsement before the time of exportation on being satisfied that all the relevant CITES requirements are fulfilled and that there are no other

factors potentially affecting the validity of the licence. If the Director returns a cancelled licence to the holder pending the determination of an appeal, the licence holder will not be able to use the licence because an authorized officer will not endorse the licence under the circumstances. A licence without export or re-export endorsement will not be accepted by the importing country. If the licence holder turns out to be successful in his appeal against the cancellation decision, then an authorized officer will no longer refuse to endorse the licence on the ground of the pending appeal.

(i) Clause 32(2)(b) – Detention Period

The power of detention provided in this provision is modelled on similar provisions in existing laws such as section 54(2)(b) of the Police Force Ordinance (Cap. 232) and section 25(1)(b) of the Marine Parks Ordinance (Cap. 476). An authorized officer exercising this power must confine the duration of detention to a reasonable period according to the particular facts and circumstances of each individual case in order to ensure that he does not exceed his power authorized under this clause.

(j) Clause 41 – Forfeiture of Seized Items in Prosecution Cases

It is possible that a defendant prosecuted under clause 38 for obstructing an authorized officer exercising his statutory power may be an employee or agent of the owner of the thing seized rather than the owner himself. In the unlikely event that the defendant is a total stranger unrelated to the owner, it is not the policy intent that the thing should be forfeited to the government in the absence of any fault on the part of its owner. An authorized officer will not make an application to the court or magistrate for forfeiture indiscriminately in such case. The Judiciary can also be relied on to make a fair and reasonable judgment on whether it is appropriate to order the forfeiture or return of the thing seized based on the particular facts and circumstances of the case concerned.

(k) Clause 42 – Forfeiture of Seized Items in Cases with no Prosecution

Clause 42(2) is a re-enactment of the existing section 13(2A) of Cap.

187. Such provision forms part of the scheme under Part 7 of the Bill to deal with things seized under clause 34. It is intended to cover cases where things were seized under clause 34 but there is insufficient evidence to bring a prosecution against a particular suspect. In such circumstances, it is necessary to enable an authorized officer, like clauses 40 and 41, to apply to the court or magistrate for an order to dispose of the thing seized. It is not the policy intent that things seized which are not in contravention of the Bill should be forfeited to the government and an authorized officer will not make an application to the court or magistrate for forfeiture of things seized in such circumstances. Again, the Judiciary can be relied on to make a fair and reasonable judgment on whether it is appropriate to order the forfeiture or return of the thing seized based on the facts and circumstances of the case.

Yours sincerely,

(Eric CHAN)
for Permanent Secretary for the Environment,
Transport and Works (Environment)

Annex B

LS/B/18/04-05
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2877 5029

Secretary for the Environment, Transport and Works
Environment, Transport and Works Bureau
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By Fax (2834 5648) and By Post

7 May 2005

Dear Mr CHAN

Protection of Endangered Species of Animals and Plants Bill ("the Bill")

I am scrutinizing the legal and drafting aspect of the Bill and have the following comments:

Section 2

Convention instrument

(a) "Convention instrument" is defined in section 2(1) of the Bill to mean a resolution, decision or notification adopted or made by the Conference of the Parties, or issued by the Secretariat, in relation to the Convention.

(b) Schedule 3 sets out, with or without modification, the relevant parts of Convention instruments that have the force of law in Hong Kong.

(c) Section 53(b) of the Bill stipulates that the Secretary may by regulation provide for any matter so as to enable any part of a Convention instrument to have the force of law in Hong Kong with or without modification.

(d) According to the website of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"):

> "The text of the Convention provides a basic framework for the implementation of CITES.";

> "Guidance is regularly required to solve problems and to improve the effectiveness of the Convention.";
>
> "One of the tasks of the Conference of the Parties is to make recommendations to provide such guidance. These recommendations are recorded in one of two ways; either in Resolutions or in Decisions. Of these two types of recommendation, Resolutions are intended to be of a more permanent nature, guiding implementation of the Convention over periods of many years."; and
>
> "The Decisions, however are of a different nature. Typically they contain instructions to a specific committee or to the Secretariat. This means that they are to be implemented, often by a specified time, and then become out of date.".

Please clarify the policy intent of the selection criteria of "relevant parts of the Convention instrument that have the force of law in Hong Kong" in Schedule 3.

Re-export certificate

Under CITES, import of any specimen of a species included in Appendix I and Appendix II requires the prior grant and presentation of either an export permit or a re-export certificate. Under the Bill, import of any specimen of a species included in Appendix I and Appendix II requires the production of an export permit. As "export" is expressly defined in section 2(1) of the Bill not to include re-export, it seems that a re-export certificate is not acceptable in Hong Kong as an alternative to an export permit. Kindly confirm.

Sections 3 and 22 of the Bill

Article VII of CITES stipulates that the regulations of trade in specimens of species included in Appendix I, Appendix II and Appendix III shall not apply to the transit or transhipment of specimens through or in the territory of a Party while the specimens remain in Customs control. Section 3 of the Bill appears to provide an exemption when the thing is in or on "the incoming carrier" and not remains under the control of the Director or an authorized officer. Please clarify.

Section 22 of the Bill sets out, inter alia, the provisions governing the import and re-export of a specimen of a scheduled species in transit; the requirement of which are different from those provided under the other sections governing the import and re-export of a specimen of a scheduled species. Please clarify the policy intent for the two sets of requirements.

Sections 10 and 16 of the Bill

Sections 10 and 16 of the Bill provide for higher penalties for offences convicted under sections 5, 6, 7, 8 or 9 and sections 11, 12, 13, 14 or 15 respectively if the court is satisfied that the act (including possession or control of a specimen) in respect of which the person has been so convicted was carried out (whether by him or on his behalf) for commercial purposes. The offence committed by a person under sections 9 and 15 is "in his possession or under his control a specimen of an Appendix I and Appendix II species". Is it the same act as referred to in sections 10 and 16?

Sections 18 and 21

Kindly clarify the meaning of:

(i) the specimen is not a live animal or plant of wild origin, nor is it a live animal or plant that shall be treated as a specimen of an Appendix II species under section 2(2); and

(ii) the species is not of a population included in Appendix I if the species is specified in both Appendix I and Appendix II.

Sections 23 and 52

What is the difference between the re-export licence issued by the Director under section 23 and the re-export certificate issued by the Director under section 52; both of them should be issued for the compliance of the requirements imposed by CITES?

Section 26

Section 26 (4) of the Bill provides that if that holder lodges an appeal under section 46(1) against the Director's decision relating to the cancellation of the relevant licence, the Director shall return the licence to that holder pending the determination of the appeal by the Administrative Appeals Board.

Can the licence holder use the licence for the export or re-export of specimens before the determination of the appeal by the Administrative Appeals Board? Will there be any follow-up action if the specimens are exported or re-exported and subsequently the Administrative Appeals Board confirms the Director's decision relating to the cancellation of the relevant licence?

Section 32(2)(b)

Section 32(2)(b) provides that if an authorized office reasonably suspected that a person has committed, is committing or is about to commit an offence under Part 2 or 3, that officer may, on production of written evidence of his identity detain the person for a reasonable period while that officer inquires about the

suspected commission of the offence. Is there any cap on the detention period?

Section 41

Section 41(b) of the Bill provides that if an offence is prosecuted under section 29, 38 or 44, the court or magistrate may, whether or not any defendant in the proceedings is convicted of the offence, order any thing seized under section 34(1) in respect of which the prosecution was brought, or any proceeds of sale of that thing to be forfeited to the Government.

It appears that the defendant prosecuted under section 38 can be a person other than the owner of the thing seized under section 34(1). Please clarify the policy intent why the property of an individual be forfeited to the Government because another person is being prosecuted?

Section 42

Section 42(1) of the Bill provides that if a thing has been seized under section 34(1) but no prosecution for an offence under Part 2 or 3 or section 29, 38 or 44 has been brought in respect of that thing, an authorized officer may apply to the court or magistrate for an order in respect of that thing or any proceeds of sale of that thing.

Section 42(2)(b) of the Bill provides that on an application under subsection (1), the court or magistrate may order the thing concerned or any proceeds of sale of that thing to be forfeited to the Government.

Please clarify the policy intent why the property of an individual be forfeited to the Government if no prosecution has been brought.

It is appreciated that your reply in both Chinese and English could reach us by close of play, 10 May 2005.

Yours sincerely

(Monna LAI)
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